STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Peter D. O'Connell, Stephen L. Borrello, and Elizabeth L. Gleicher

CHARLIE B. HOBSON and
MARY L. HOBSON, husband and wife,

Plaintiffs-Appellees,

v

INDIAN HARBOR INSURANCE COMPANY, a foreign corp., XL INSURANCE AMERICA, INC., a foreign corp., and XL INSURANCE COMPANY OF NEW YORK, INC., a foreign corp.,

Defendants-Appellants,
-and-

WILSON INVESTMENT SERVICE AND CONSTRUCTION, INC., WILSON INVESTMENT SERVICE, CRESCENT HOUSE APARTMENTS, CRESCENT HOUSE APARTMENTS, LLC, W-4 FAMILY LIMITED PARTNERSHIP, W-4 FAMILY, LLC and JAMES P. WILSON,

Defendants-Appellees.
_____/

Supreme Court No. 151447

Court of Appeals No. 316714

Lower Court No. 12-008167-CK

DEFENDANTS-APPELLANTS XL INSURANCE, ET AL.S' SUPPLEMENTAL BRIEF

EDMUND O. BATTERSBY (P 35660)
SAMUEL I. BERNSTEIN (P 10745)
Attorneys for Plaintiffs-Appellees Hobsons
31731 Northwestern Highway, #333
Farmington Hills, MI 48334
(248) 737-8400
ebattersby@sambernstein.com

MARK R. BENDURE (P 23490)
Appellate Counsel for Plaintiffs-Appellees Hobsons
645 Griswold, Suite 4100
Detroit, MI 48226
(313) 961-1525
bendurelaw@cs.com

MARK E. MORLEY (P 17971)
DREW BROADDUS (P 64658)
Attorneys for Defendants-Appellants Indian Harbor Ins. Co., XL Ins. America. Inc., and XL Ins. Co. of New York
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
(616) 272-7966
dbroaddus@secrestwardle.com

FRANCIS W. HIGGINS (P 28111)
Attorney for Defendants-Appellees Wilson Investment, Crescent House Apartments Crescent House Apartments, LLC, W-4 Family Limited Partnership, W-4 Family, LLC and James Wilson
2799 Coolidge Highway
Berkley, MI 48072
(248) 541-5575
mhlawmichigan@aol.com
_____/

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

COURT RULES

ARGUMENT

I. Introduction

This is an Application for Leave to Appeal from the March 10, 2015 decision of the Court of Appeals. The Court of Appeals affirmed the Wayne County Circuit Court's denial of the Motion for Summary Disposition brought by Defendants-Appellants Indian Harbor Ins. Co., XL Ins. America Inc., and XL Ins. Co. of New York (hereinafter collectively referred to as "XL Insurance"). In this motion, XL Insurance sought dismissal of this declaratory judgment action on the grounds that an unambiguous policy exclusion – specifically, a "Total Pollution Exclusion Endorsement" – precluded coverage.

XL Insurance asked this Court to review this case because, *inter alia*, in denying XL Insurance's motion, the lower courts appear to have invoked some form of the "doctrine of illusory coverage" (see 5/24/13 trans, pp 14-15), contrary to *Ile v Foremost Ins Co*, 493 Mich 915; 823 NW2d 426 (2012).[1] In *Ile* this Court held:

> The Court of Appeals erroneously concluded that the underinsured motorist coverage in the insurance policy issued by the defendant … was illusory because [plaintiff] could reasonably believe that his insurance premium payment included some charge for underinsurance when there are no circumstances in which [plaintiff] could recover underinsured motorist benefits given the policy limits Ile selected. **We have expressly rejected the notion that the perceived expectations of a party may override the clear language of a contract.** The lower court applied the same reasoning as the Court to Appeals panel in *Ile*. *Ile*, 493 Mich at 915 (emphasis added).

Here, the trial court commented at the May 24, 2013 hearing:

[1] In *Ile*, the Court of Appeals described the doctrine as follows: "[t]he 'doctrine of illusory coverage' encompasses a rule requiring an insurance policy to be interpreted so that it is not merely a delusion to the insured. Courts avoid interpreting insurance policies in such a way that an insured's coverage is never triggered and the insurer bears no risk." *Ile v Foremost Ins Co*, 293 Mich App 309, 315-316; 809 NW2d 617 (2011) (citations omitted).

> Why would this person buy your insurance? Why? And then he has a fire and somebody is injured and you say oh, you're not covered. … If they would have just been burned, they would have been covered. … That's an absurd result in reading this policy. They couldn't have intended this when you have this total pollution exclusion…. (5/24/13 trans, pp 14-15.)

In affirming, the Court of Appeals conflated smoke with fire (Ex. A, p 6), and essentially reasoned that a pollution exclusion just could not apply to these facts, regardless of its language. The panel placed unwarranted emphasis on the historic "impetus behind pollution exclusion clauses similar to the one at issue" (Id., p 5) – rather than the policy language – and determined that XL Insurance's position would "extend the scope of the pollution exclusion beyond the scope of its original intent…." (Id., p 6.) Ultimately, the panel found that pollution exclusions only apply to "'occurrences' involving the pollutant as a pollutant" (Id., p 7) – in other words, judicially inserting a limitation into the exclusion, in direct contradiction to *McKusick v Travelers Indem Co*, 246 Mich App 329; 632 NW2d 525 (2001),[2] which the panel was bound by MCR 7.215(J)(1) to follow.

This Court's holding in *Ile* makes clear that the perceived expectations of a party – which the trial court and, in a less obvious way, the Court of Appeals relied upon – *may not* override unambiguous policy language. Indeed, the error was even more apparent here, as the insured had no reasonable expectation of coverage for "smoke" or "soot" damages flowing from a fire,

[2] "The scope of the total pollution exclusion has been repeatedly litigated, spawning conflicting judicial decisions throughout the country." *Apana v TIG Ins Co*, 574 F3d 679, 682 (9th Cir 2009). "Most state courts fall roughly into one of two broad camps." *Id.* "Some courts apply the exclusion literally because they find the terms to be clear and unambiguous." *Id.* "Other courts have limited the exclusion to situations involving traditional environmental pollution, either because they find the terms of the exclusion to be ambiguous or because they find that the exclusion contradicts policyholders' reasonable expectations." *Id.* Michigan falls within the first camp, i.e., states that "apply the exclusion literally." See *Id.*, citing *McKusick*. The Court of Appeals effectively accepted Plaintiff's invitation to follow the second camp, i.e., to give weight to the "policyholders' reasonable expectations."

where a "hostile fire" exception to the pollution exclusion had been expressly and unambiguously *removed* from the policy by the Total Pollution Exclusion Endorsement. (See Ex. A, p 2 n 2.) By treating smoke as the same thing as fire, the panel effectively wrote the "hostile fire" exception *back into* the Total Pollution Exclusion, even though that exception to the exclusion had been "clearly" removed by an endorsement "before the alleged injuries occurred." (Id.)

A policy cannot be illusory when there are circumstances where the insured's coverage could be triggered. Here, in denying XL Insurance's motion, the trial court acknowledged at least one such circumstance – if the underlying tort claimants had been burned. (5/24/13 trans, pp 14-15.) The Court of Appeals majority echoed this. (Ex. A, pp 3, 5.) Nonetheless, both courts refused to apply the Total Pollution Exclusion, with the trial court finding that doing so would be "absurd." (Id.)

On December 9, 2015, this Court directed "the Clerk to schedule oral argument on whether to grant the applications or take other action." *Hobson v XL Insurance, et al*, __ Mich __; 871 NW2d 714 (2015) (No. 151447) (Ex. B). The Order further the directed the parties to file "supplemental briefs within 42 days … addressing (1) whether the Total Pollution Exclusion Endorsement is ambiguous, and (2) whether there was a discharge, dispersal, seepage, migration, release, or escape of a pollutant that caused the plaintiffs' injuries." (Id.)

II. The XL Total Pollution Exclusion Endorsement is not ambiguous.

The exclusion at issue states:

TOTAL POLLUTION EXCLUSION ENDORSEMENT

> This endorsement modifies insurance provided under the following:

> **COMMERCIAL GENERAL LIABILITY COVERAGE PART**
>
> Exclusion **f.** under Paragraph **2., Exclusions** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:
>
> This insurance does not apply to:
>
> **f. Pollution**
> **(1)** "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.
> **(2)** Any loss, cost or expense arising out of any:
> **(a)** Request, demand, order or statutory or regulatory requirement that any insured … in any way respond to, or assess the effects of "pollutants"; or
> **(b)** Claim or suit by or on behalf of a governmental authority for damages because of … in any way responding to, or assessing the effects of, "pollutants." (Ex. C, emphasis in original.)

Elsewhere in the policy, the term "pollutants" is defined as "any solid, liquid, gaseous or thermal irritant or contaminant, *including smoke* … [and] *soot*…." (Id., p 13, emphasis added.)

This Court has historically had little trouble construing pollution exclusions similar to this. See. e.g., *Protective Nat'l Ins Co v Woodhaven,* 438 Mich 154, 167; 476 NW2d 374 (1991).[3] Here it is undisputed that the XL policy contains an exclusion for "[b]odily injury" or

[3] But there are two important differences between the policy at issue here, and the one at issue in *Protective Nat'l,* 438 Mich at 160. The *Protective Nat'l* policy excluded claims arising out of "the discharge, dispersal, release or escape" of pollutants. *Id.* XL's exclusion is broader, as it contains two additional words in its disjunctive list: "seepage" and "migration." (Ex. C.) Therefore, unlike the *Protective Nat'l* policy – the terms of which made "the behavior of the pollutants in the environment, after release … irrelevant," *Protective Nat'l,* 438 Mich at 162 – the behavior of the smoke and soot after the initial release *is relevant* under the terms of XL policy. This means that even if the fire itself somehow did not constitute a "discharge," "dispersal," "release," or "escape" of smoke and soot, the smoke and soot's subsequent migration from the room where the fire started, and seepage into the Plaintiff's unit, would still independently trigger the exclusion. The second key distinction is that the XL policy *does not* have a "sudden and accidental" exception to its *total* pollution exclusion, as was the case in *Protective Nat'l,* 438 Mich at 162. (See Ex. C.)

"property damage" which "would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." (Plaintiffs' 6/10/15 Answer to Application, p 5.) The underlying Plaintiffs alleged "smoke inhalation injuries." (Ex. C attached to XL's 4/20/15 Application, ¶¶ 10, 11.)

For the first time in the Court of Appeals,[4] Plaintiffs argued that that policy was ambiguous[5] because the Total Pollution Exclusion Endorsement supposedly conflicts with the pollution exclusion that appears "in the body of the policy" (which contains the aforementioned "hostile fire" exception). (Ex. G attached to XL's 4/20/15 Application, pp 5-6, 10-12.) This argument is untenable because the exclusion "in the body of the policy" *was completely superseded, nullified, and erased* by the Total Pollution Exclusion Endorsement and therefore, there is no conflict and no ambiguity. "[I]nsurance contract law … dictates that when an endorsement [alters] language from a policy, *a court must not consider* the [altered] language in its interpretation of the remaining agreement." *Valassis Communications v Aetna Cas & Sur Co,* 97 F3d 870, 873 (6th Cir 1996) (emphasis added, applying Michigan law in diversity). "When

[4] Plaintiffs never argued in the trial court that the policy was ambiguous, nor did they expressly invoke the superseded "hostile file" language from the "body of the policy." "Issues raised for the first time on appeal are not ordinarily subject to review." *Coates v Bastian Bros, Inc*, 276 Mich App 498, 510; 741 NW2d 539 (2007).

[5] "Both the insured and the insurer are likely to take conflicting views of coverage, but neither conflicting expectations nor disputation is sufficient to create an ambiguity." *Forbau v Aetna Ins Co,* 876 SW2d 132, 134 (Tex 1994). See also *Union Ins Co v Houtz,* 883 P2d 1057, 1061 (Colo 1994) (holding that a mere disagreement regarding the interpretation of an insurance policy term does not create an ambiguity). "An expectation of coverage ... cannot create an ambiguity; it is merely an interpretive tool used to resolve an ambiguity once it is found to exist." *Fire Insurance Exchange v Superior Court,* 116 Cal App 4th 446, 456–57; 10 Cal Rptr 3d 617 (2004). "[A]n abstract ambiguity based on a semantically permissible interpretation of a word or phrase cannot create coverage where none would otherwise exist." *State Farm Gen Ins Co v JT's Frames, Inc,* 181 Cal App 4th 429, 444; 104 Cal Rptr 3d 573 (2010). "Michigan's rule that an ambiguous term is construed strictly … against the drafter, i.e., the insurer … never comes into play" unless a term is first found to be ambiguous. *State Farm Fire & Cas Co v Liberty Ins Underwriters, Inc,* 613 F Supp 2d 945, 969 (WD Mich 2009).

an endorsement conflicts with an insurance contract, the endorsement controls. … The endorsement must be regarded as a modification of the terms of the original contract of insurance…." *Whitt Mach, Inc v Essex Ins Co*, 631 F Supp 2d 927, 934-935 (SD Ohio 2009). See also *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 26; 800 NW2d 93 (2010): "[E]ndorsements by their very nature are designed to trump general policy provisions, and where a conflict exists between the provisions of the main policy and the endorsement, the endorsement prevails."[6]

Here, the Total Pollution Exclusion Endorsement states: "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY." (Ex. C.) It goes on to state: "This endorsement modifies insurance provided under the following: COMMERCIAL GENERAL LIABILITY COVERAGE PART *Exclusion f.* under Paragraph 2., Exclusions … is replaced by the following…." (Id.) "The following" does not include the "hostile fire" exception to the exclusion, which Plaintiffs tacitly relied upon below. Plaintiff's ambiguity argument therefore fails under well-established principles of insurance policy interpretation. See *McKusick*, 246 Mich App at 340 ("The pollution exclusion endorsement specifically indicated that it modified coverage under the CGL coverage form. … [C]onflicts between the terms of an endorsement and the form provisions of an insurance contract are resolved in favor of the terms of the endorsement."). Therefore, under well-established principles of insurance policy interpretation, the pollution exclusion "in the body of the policy" *simply was not part of the*

[6] See also *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369, 380; 460 NW2d 329 (1990) ("When a conflict arises between the terms of an endorsement and the form provisions of an insurance contract, the terms of the endorsement prevail."); *Jones v Philip Atkins Constr Co*, 143 Mich App 150, 160; 371 NW2d 508 (1985) ("If the language of an endorsement and the general provisions of the policy conflict, the endorsement will prevail, and the policy remains in effect as altered by the endorsement."); *Tiano v Aetna Casualty & Surety Co.*, 102 Mich App 177, 184; 301 NW2d 476 (1980) (same).

analysis, given the elimination of the "hostile file" language in the endorsement. The old pollution exclusion cannot conflict with anything because it ceased to be a part of the policy once the endorsement was issued.

The prior exclusion, with the hostile fire exception, became nothing more than drafting history once it was superseded by the endorsement. In *Bituminous Cas Corp v Sand Livestock Systems, Inc,* 728 NW2d 216, 222 (Iowa 2007), the Iowa Supreme Court criticized courts that had found ambiguity based on the claimed drafting history of a policy provision, as "inappropriate and unwise." In *Bituminous Cas Corp,* the Court rejected the argument that a pollution exclusion was "ambiguous because it [was] unclear whether the exclusion extend[ed] beyond 'traditional environmental pollution.'" *Id.* at 221. Much like this Court,[7] Iowa courts "may not refer to extrinsic evidence in order to create ambiguity." *Id.*

Although the Court of Appeals here did not adopt Plaintiffs' ambiguity argument, the argument does reveal a fundamental misapprehension of how the endorsement operated. And this misapprehension seeped into the Court of Appeals' reasoning, even if the term "ambiguity" was not specifically used. The pollution exclusion originally said: "this subparagraph does not apply to … (iii) 'bodily injury' or 'property damage' arising out of heat, smoke or fumes from a 'hostile fire'…." (Ex. F attached to XL's 4/20/15 Application.) But the Total Pollution Exclusion *Endorsement* specifically removed this language. (Id.) By treating smoke as the same thing as fire, the panel effectively wrote the "hostile fire" exception *back into* the Total Pollution

[7] See also *Mich Chandelier Co v Morse,* 297 Mich 41, 48; 297 NW 64 (1941); *Hall v Equitable Life Assurance Soc,* 295 Mich 404, 409; 295 NW 204 (1940). Plaintiffs claim that the policy is ambiguous on its face (Plaintiffs' 6/10/15 Answer to Application, pp 14-16) and therefore, Plaintiffs have asserted a patent ambiguity as opposed to a latent ambiguity. "[E]xtrinsic evidence may not be used to identify a patent ambiguity...." *Shay v Aldrich,* 487 Mich 648, 667; 790 NW2d 629 (2010).

Exclusion, even though that exception to the exclusion had been "clearly" removed by an endorsement "before the alleged injuries occurred." (Ex. A, p 2 n 2.) Indeed, both of the lower courts started from the unstated assumption that there was a "hostile fire" exception to the pollution exclusion – despite the plain language of the endorsement[8] – based on Plaintiffs' assertion that such an exception would have been reasonable.

Related to the ambiguity question, the language quoted in Judge O'Connell's additional "reason to rule in plaintiff's favor," as stated in his concurrence, is unambiguously irrelevant to this case. Plaintiff never relied upon this language in the trial court, in the Court of Appeals, or in response to XL Insurance's first Application to this Court in 2014. And for good reason. As XL Insurance explained in its Application, Section I – Coverages, 2. Exclusions, on the fifth page of the policy, provides that "[e]xclusions c. through n. do not apply to damage by fire to premises while *rented to you* or temporarily *occupied by you* with the permission of the owner." (Plaintiffs' 6/10/15 Answer to Application, pp 5, 16, emphasis added.) Since the Total Pollution Exclusion is exclusion f., this language supposedly (in the eyes of Judge O'Connell) negated XL Insurance's ability to invoke that exclusion. Simply put, **the language invoked *sua sponte* by Judge O'Connell is inapplicable to this case** because it only applies to "premises … rented to" *the insured* or "temporarily occupied by" *the insured*, "with the permission of the owner." The word "you" as used in this section refers to the named insured, Defendants Wilson, *not to third-party tort claimants such as these Plaintiffs.* Judge O'Connell overlooked the fundamental fact that *these Plaintiffs were not the insured.*

[8] Again, the Court of Appeals initially acknowledged that the "hostile fire" exception had "no bearing in this case" (Ex. A, p 2 n 2), but then found that the exclusion could not apply, essentially because there was a hostile fire (Id., p 6).

Defendants Wilson owned the apartment complex in question; there is nothing in the record suggesting that the complex was rented *to the Defendants Wilson* or occupied *by the Defendants Wilson* with the permission of some other entity. (See Ex. A attached to XL's 4/20/15 Application, p 2, citing Plaintiffs' Complaint.) Judge O'Connell oversimplified this provision by opining that "exclusion f. does not apply in this case because the Hobsons' claim concerns "damage by fire to premises," without giving consideration to the rest of the clause (i.e., "premises … *rented to you* or *temporarily occupied by you*…."). The fact that the insured owned the premises negates this exception to the pollution exclusion (which may explain why Plaintiffs never raised this argument).[9] Simply put, the argument falls apart because the term "you" in this context **does not refer to these Plaintiffs.** (See Plaintiffs' 6/10/15 Answer to Application, p 16.)

III. Plaintiffs' personal injury Complaint alleged a "discharge, dispersal, seepage, migration, release, or escape" of a "pollutant" that caused the Plaintiffs' injuries.

Plaintiffs' claim against their landlord (XL's insured) was predicated on the allegation that the "building manager drifted off to sleep while preparing a meal," causing a fire. (Plaintiffs' 6/10/15 Answer to Application, p 1 n 4.) Smoke and/or soot from that fire allegedly *migrated* from the unit where the building manager was cooking, and *seeped* into the Plaintiffs' residential unit. (See Ex. 6 attached to Plaintiffs' 6/10/15 Answer to Application, p 1.)[10] *No one has ever*

[9] Judge O'Connell's concurrence also makes the same error as the majority: conflating smoke with fire. (Ex. A, concurring opinion, p 1.) By conflating smoke with fire, the Court of Appeals contravened the long-standing principle that "contractual language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing whims of members of [the court]." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 582; 702 NW2d 539 (2005).

[10] "The Hobsons' attorney claims that a fire occurred at this location during the early morning hours *in another apartment at this complex*, notably Apartment 2." (Ex. 6 attached to Plaintiffs' 6/10/15 Answer to Application, p 1, emphasis added.) This is from an exhibit relied upon *by the Plaintiffs* in the Court of Appeals.

alleged that there was a fire inside the Plaintiffs' unit. (See Ex. 3 attached to Plaintiffs' 6/10/15 Answer to Application.) In order to have suffered the smoke inhalation injuries alleged in their Complaint, smoke from the fire *that started in another unit* had to have dispersed, seeped, or migrated into the Plaintiffs unit, and had to have been released or escaped from the unit where the building manager allegedly started the fire.[11]

Despite this, Plaintiffs maintain (and the Court of Appeals agreed) that the smoke and soot referenced in the Plaintiff's underlying Complaint did not trigger the exclusion, based upon the definitions of "discharge," "dispersal," "seepage," "migration," "release" or "escape." (Ex. A, p 6.) The panel's analysis in this respect contravenes the commonly understood meanings of these words. As noted above, the Total Pollution Exclusion Endorsement excludes any "bodily injury" which "would not have occurred in whole or part but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape" of "pollutants" (which, again, the policy defines to include "smoke" and "soot"). (Id., p 2.) The exclusion uses the word "or," meaning the list is disjunctive and any one of the six events listed (a discharge, dispersal, seepage, migration, release, *or* escape) will trigger the exclusion. See *Holiday Hospitality Franchising, Inc v AMCO Ins Co*, 983 NE2d 574, 579 (Ind 2013). Here Plaintiffs relied on one of several dictionary definitions of "disperse" (Ex. G attached to XL's 4/20/15

[11] It bears repeating that although *Protective Nat'l* is generally instructive, that decision's applicability breaks down at the issue of the "behavior of the pollutants" after release. Again, XL's exclusion is broader, as it contains two additional words in its disjunctive list: "seepage" and "migration." (Ex. C.) Therefore, unlike the *Protective Nat'l* policy – the terms of which made "the behavior of the pollutants in the environment, after release … irrelevant," *Protective Nat'l*, 438 Mich at 162 – the behavior of the smoke and soot after the initial release *is relevant* under the terms of XL policy. This means that even if the fire itself somehow did not constitute a "discharge," "dispersal," "release," or "escape" of smoke and soot (which, as explained below, it did), the smoke and soot's subsequent migration from the room where the fire started, and seepage into the Plaintiff's unit, would still independently trigger the exclusion.

Application, p 13), but one of the definitions Plaintiffs ignored is significant: "to cause to become spread widely." (Ex. G-12 attached to XL's 4/20/15 Application, definition of "disperse," p 1 of 5.) There is little doubt that fire causes smoke "to become spread widely." Likewise, one of the definitions of "migrate" is "to change position in … [a] substance." (Ex. G-12 attached to XL's 4/20/15 Application, definition of "migrate," p 1 of 3.) This is precisely what fire does: causes smoke to migrate through the air. Also, Plaintiffs selectively quoted Merriam-Webster's definition of "release," ignoring that one of Merriam-Webster's examples is "the release of heat into the atmosphere." (Ex. G-12 attached to XL's 4/20/15 Application, definition of "release," p 3 of 5.) Again, fire releases both smoke and heat into the atmosphere.

Indeed, if a fire could not by its very nature cause a "discharge, dispersal, seepage, migration, release, or escape" as Plaintiffs asserted (Ex. G attached to XL's 4/20/15 Application, p 13), then the rescinded "hostile fire" exception that originally appeared in the policy *would have been completely superfluous* because, under Plaintiffs' reasoning, a hostile fire could never implicate the pollution exclusion in the first place. The fact that such exceptions even exist in the insurance industry refutes the Plaintiffs' position in this regard. See *Firemen's Ins Co v Kline & Son Cement Repair, Inc,* 474 F Supp 2d 779, 797 (ED Va 2007).[12] In short, if the pollution

[12] In *Firemen's Ins Co,* 474 F Supp 2d at 797, the District Court noted that the "Hostile Fire Exception to the Pollution Exclusion clause signifies that the Pollution Exclusion applies to indoor pollution." Such an exception "ensures that the pollution exclusion does not eliminate coverage for outbreaks of fire on the premises by excluding coverage for damage resulting from smoke and fume inhalation, smoke damage, and other claims, whether such damage occurs on or off the premises." *Id.* There, by implication, the omission of such an exception denotes that the pollution exclusion *does* eliminate coverage for "outbreaks of fire on the premises." As further explained in In *Firemen's Ins Co,* 474 F Supp 2d at 797, "[t]he Hostile Fire Exception clearly applies to accidents that occur within a building and that do not result from what is commonly considered industrial environmental pollution" would therefore "be unnecessary if the Pollution Exclusion clause were limited to traditional environmental pollution scenarios, because the usual fires (and smoke and fumes generated) in an industrial or indoor setting do not qualify as a 'traditional' environmental occurrence."

exclusion required that the pollutant first be contained – and then somehow break free of its containment – before the exclusion could apply, then the policy easily could have said so. It does not. See *Bituminous Cas Corp,* 728 NW2d at 221 (carbon monoxide produced by a propane power washer, which had been improperly run inside a building without ventilation, represented a "dispersal," "release," or "escape" of a "pollutant"; there was no suggestion that the carbon monoxide had to have been contained at some point after the device created it, and then break free, in order for the exclusion to apply).

To a large extent, Plaintiffs' argument – that a pollutant first had to be "contained" in order for the exclusion to apply – seems to flow from the tacit assumption that the pollution exclusion should only apply to traditional environmental incidents. This position cannot be reconciled with *Protective Nat'l,* 438 Mich at 164 (rejecting the dissenting Justices' assertion that "the very title of the clause" itself implied that "the exclusion … should apply only to acts of pollution"). This Court has found "the language of the policy to be better evidence of what the exclusion excepts from coverage" than the legal community's general understanding of how such exclusions operate. *Id.*[13]

Moreover, numerous courts throughout the United States have held that pollution exclusions *are not* limited to "traditional environmental damage." See *Bituminous Cas Corp,* 728 NW2d at 221-222. As Nebraska's Supreme Court held in *Cincinnati Insurance Co v Becker Warehouse, Inc,* 262 Neb 746, 755-756; 635 NW2d 112 (2001), a pollution exclusion can be "quite broad" yet still be unambiguous; "[t]he language of the policy does not specifically limit excluded claims to traditional environmental damage; nor does the pollution exclusion purport to

[13] In contrast to the panel here, who tried to discern the "original intent" of XL's Total Pollution Exclusion Endorsement through "the background and origination of pollution exclusion clauses in general." (Ex. A, pp 5-6.)

limit materials that qualify as pollutants to those that cause traditional environmental damage." The Nebraska Supreme Court further observed in 2001 that a "majority of state and federal jurisdictions have held that absolute pollution exclusions are unambiguous as a matter of law and, thus, exclude coverage for all claims alleging damage caused by pollutants," not just "traditional environmental pollution claims." *Id.* at 753 (citation omitted). The U.S. Court of Appeals for the Eighth Circuit echoed this observation in *Church Mut Ins Co v Clay Ctr Christian Church*, 746 F3d 375, 380 (8th Cir 2014).[14] Such an approach is consistent with, if not mandated by, this Court's holding in *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005) that an unambiguous insurance policy provision "is to be enforced as written" irrespective of any "judicial assessment of reasonableness…." See also *McKusick*, 246 Mich App at 337-338.

Plaintiffs have not articulated any reason for reversing *McKusick*, nor have they even asked this Court to do so. In *McKusick* the Court of Appeals held, in a published decision that has been relied upon extensively over the last 15 years:

> Plaintiffs urge us to construe the pollution exclusion provision so as to require that contamination by a pollutant be widespread, making the exclusion applicable only to claims of environmental pollution, i.e., land, air, water, and other natural resource contamination. However, we are bound by well-established principles of contract construction, including that an insurance contract is not ambiguous if it fairly admits of only one interpretation. … In this case, the pollution exclusion endorsement unambiguously provided that no coverage would be afforded for damage claims resulting from the discharge, dispersal, seepage, migration, release, or escape of pollutants, as defined by the policy,

[14] Additionally, in a statement that could have been in direct response to the trial court's comments here, the *Church Mut Ins* panel noted that "[t]he broad nature of the pollution exclusion may cause a commercial client to question the value of portions of its commercial general liability policy, but, as an appellate court reviewing terms of an insurance contract, we cannot say that the language of the pollution exclusion is ambiguous in any way." *Church Mut Ins*, 746 F3d at 380.

> arising out of [the insured's] products. There are no exceptions to the exclusion and no limitations regarding its scope, including the location or other characteristics of the discharge. Although we recognize that other jurisdictions have considered the terms "discharge," "dispersal," "release," and "escape" to be environmental terms of art, thus requiring the pollutant to cause traditional environmental pollution before the exclusion is applicable, we cannot judicially engraft such limitation.

McKusick, 246 Mich App at 337-338. This Court denied leave to appeal from that holding, *McKusick v Travelers Indem Co*, 468 Mich 889; 661 NW2d 236 (2003). As a published decision of the Court of Appeals issued after November 1, 1990, see MCR 7.215(C)(1) and (J)(1), *McKusick* has been the law of this State for nearly 15 years. Policy language has been drafted, and premiums have been set, in reliance upon it. Moreover, *McKusick* is in accord with the national trend of courts refusing to engraft a "traditional environmental incident" limitation onto total pollution exclusions. See *Bituminous Cas Corp*, 728 NW2d at 221-222; *Cincinnati Insurance Co*, 262 Neb at 755-756. See also *Evanston Ins Co v Lapolla Indus*, 2015 U.S. App LEXIS 22552 (5th Cir Dec. 23, 2015) (Ex. D).

In *Evanston Ins*, the U.S. Court of Appeals for the Fifth Circuit very recently dealt with a record and arguments that were quite similar to those presented here. The insured in *Evanston Ins* wanted Evanston to defend and indemnify it from an underlying suit brought by homeowners who had allegedly been injured by vapors, emitted by insulation that plaintiff had installed in their home. Evanston denied coverage based upon a pollution exclusion nearly identical to the one at issue here. The panel began its analysis by noting that "[t]he key is whether the plaintiffs' operative pleading allegations [in the underlying case] fall within the pollution exclusion's plain terms – that is, whether the allegations about what caused the plaintiffs' injuries arose out of the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants." *Id.* at *5-6 (citation omitted). The panel determined that a "plain reading of the [underlying] complaint

shows that all of the plaintiffs' injuries, both personal injury and property damage, were alleged to have been caused by 'pollution' as defined by the policies." *Id.* at *8. Like the Plaintiffs here, the insured in *Evanston Ins* tried to avoid the exclusion by arguing that there had been no "discharge, dispersal, release or escape." But the District Court and the Fifth Circuit both roundly rejected this argument, with the appellate panel finding that "case law[15] supports the conclusion that the alleged damages arose from the release and migration of the insulation's vapors rather than from the presence of the insulation itself." *Id.* at *10. The panel also rejected the insured's invitation to go beyond the pleadings in the underlying case and consider other evidence that the homeowners had "physically touched and examined the spray foam insulation" therefore, purportedly were not injured solely by inhaling the vapors. *Id.* at *11.[16]

Moreover, the *Hobson* panel's analysis regarding the absence of a "discharge, dispersal, seepage, migration, release, or escape" (see Plaintiffs' 6/10/15 Answer to Application, pp 17-18)[17] runs the risk of nullifying all pollution exclusions – and perhaps many other kinds of exclusions – since almost every occurrence can in some way be traced to someone's

[15] This case law was described by the trial court, *Evanston Ins Co v Lapolla Indus,* 93 F Supp 3d 606, 619-620 (SD Tex 2015), as *Nautilus Ins Co v Country Oaks Apts Ltd,* 566 F3d 452, 457 (5th Cir 2009) (finding that the pollution exclusion's "requisite movement clearly occurred because the carbon monoxide at issue accumulated only after being discharged from [the underlying plaintiff's] furnace," and "[t]he mere fact that the carbon monoxide accumulated in the contained space of an apartment, as opposed to the environment generally, does not change this analysis") and *Hamm v Allstate Insurance Co,* 286 F Supp 2d 790 (ND Tex 2003).

[16] Much like how the Plaintiffs here suggested, for the first time in the Court of Appeals, that they may have suffered burns in addition to smoke inhalation injuries. (See XL's 4/20/15 Application, pp 16-17.)

[17] The panel found that "the alleged injuries were not caused in whole or in part by a pollutant that was discharged, dispersed, seeped, migrated, released or escaped. Rather, the injuries allegedly arose from the negligence of the insureds…." (Plaintiffs' 6/10/15 Answer to Application, p 18.)

negligence.[18] This, again, cannot be reconciled with *Protective Nat'l*, 438 Mich at 164 – where the pollution exclusion could have been obviated by simply saying the underlying case was about the insured's negligent use of pesticides. Even the most obvious "traditional environmental harm" which "the pollution exclusion clause was designed to exclude coverage for" (Ex. A, p 7) – such as the grounding of the *Exxon Valdez* supertanker in 1989 – could, under the panel's reasoning, simply be re-characterized as *really being* a claim for the negligence of the ship's captain, as opposed to a claim for the seepage, release, or discharge of 53 million gallons of crude oil.[19] If that were the case, it would be as if the pollution exclusion did not exist at all. But that is not the law of this State. *Hunt v Drielick*, 496 Mich 366, 372-373; 852 NW2d 562 (2014) ("clear and specific exclusions must be enforced…."). And the problems with the *Hobson* panel's reasoning do not end with pollution exclusions. An exclusion for "liquor liability," for example (Ex. 2 attached to Plaintiffs' 6/10/15 Answer to Application, p 28), could be avoided simply by saying that an employee of the insured served the liquor negligently. An exclusion for "electronic data" (Id., p 31) could be nullified simply saying that the claim really isn't for lost data but rather, for the insured's employee's negligence in deleting it. And so forth.

Also, by re-characterizing the Plaintiffs' alleged injuries as *really* being about the insured's agent's negligence in starting the fire, rather than about inhaling smoke and soot, the panel contravened the well-established rule that the specific governs the general.[20] The fact that fire claims would *in general* be covered is not probative of whether *a particular* fire claim

[18] See, for example, Ex. 2 attached to Plaintiffs' 6/10/15 Answer to Application, p 39, where the XL policy defines an "occurrence" as "an accident."
[19] See *Exxon Shipping Co v Baker*, 554 US 471, 476-477; 128 S Ct 2605 (2008).
[20] Courts have recognized "the clear rule of construction that a specific provision in a policy governs over a general provision." *State Farm Florida Ins Co v Phillips*, 134 So3d 505, 508 (Fla App 2014).

involving "pollutants" should be. The "very nature of an exclusion is that it creates an exception to coverage that might otherwise be available under other terms of the policy." *Brocious v Progressive Ins Co,* 1999 Ohio App LEXIS 3720 (Ohio Ct App, Aug 12, 1999) (Ex. F-3 attached to XL's 4/20/15 Application). Otherwise, policy exclusions would be unnecessary. "[E]xclusionary clauses limit the scope of coverage provided under the insurance contract…." *Hawkeye-Security,* 185 Mich App 384. Therefore, the fact that a fire loss generally would fall within the coverage terms, absent an applicable exclusion, is completely irrelevant.

Related to this, Plaintiffs' reliance upon Judge O'Connell's observation that "[w]here there is fire, there is smoke" (Plaintiffs' 6/10/15 Answer to Application, p 16) falls flat. The fact that there is an "age-old relationship between smoke and fire" (Ex. A, concurring opinion, p 1) does not mean that they are *the same thing.* "An insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc,* 267 Mich App 708, 715; 706 NW2d 426 (2005). Conflating smoke with fire renders nugatory the XL policy's definition of "pollutant" which expressly delineates smoke as something distinct from fire. Again, it is difficult to fathom why "hostile fire" exceptions to pollution exclusions would even exist in the first place, if smoke and fire were synonymous for insurance coverage purposes.[21]

[21] In this respect, the XL Insurance policy's former inclusion of such an exception – if it is relevant at all – actually cuts against the Plaintiffs. See *Firemen's Ins Co,* 474 F Supp 2d at 797.

CONCLUSION AND REQUEST FOR RELIEF

The lower courts' denial of XL Insurance's Motion for Summary Disposition was in direct conflict with multiple precedents of this Court. The trial court refused to apply the Total Pollution Exclusion based upon its subjective view of the insured's expectations at the time the policy was issued, contrary to *Ile*, 493 Mich at 915. The Court of Appeals tacitly affirmed that holding. In so doing, the lower courts' holdings subject XL Insurance to risks that were not envisioned by the parties at the time the insurance contract was formed. "[A]n insurance company should not be required to pay for a loss for which it has charged no premium." *Kirschner v Process Design Assocs, Inc*, 459 Mich 587, 594; 592 NW2d 707 (1999). "Perhaps the most fundamental rule of Michigan insurance jurisprudence is that an insurer can never be held liable for a risk it did not assume and for which it did not charge or receive any premium." *Dunn v Detroit Auto Inter-Insurance Exch*, 254 Mich App 256, 270; 657 NW2d 153 (2002). Here, XL Insurance charged no premium for losses resulting from "smoke" and "soot," such as the "smoke inhalation" injuries alleged by the Plaintiffs in the Underlying Case. Moreover, by conflating smoke with fire, the Court of Appeals contravened the long-standing principle that "contractual language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing whims of members of [the court]." *Devillers*, 473 Mich at 582. By treating smoke as the same thing as fire, the panel effectively wrote the "hostile fire" exception *back into* the Total Pollution Exclusion, even though that exception to the exclusion had been "clearly" removed by an endorsement "before the alleged injuries occurred." (Ex. A, p 2 n 2.)

Specifically addressing the questions in this Court's December 9, 2015 Order, the policy simply is not, as a matter of foundational insurance law, ambiguous. Plaintiffs' ambiguity

argument – that the superseded pollution exclusion from "the body of the policy" conflicts with the Total Pollution Exclusion Endorsement – has been rejected by multiple published decisions discussed above. Particularly germane is *McKusick,* 246 Mich App at 340, which held that "[t]he pollution exclusion *endorsement* specifically indicated that it modified coverage under the CGL coverage form. … [C]onflicts between the terms of an endorsement and the form provisions of an insurance contract are resolved *in favor of the terms of the endorsement*." (Emphasis added.)

As to this Court's second question, Plaintiffs' argument that their underlying Complaint did not allege injuries from a "discharge, dispersal, seepage, migration, release, or escape" of a "pollutant" – which the Court of Appeals largely adopted – fundamentally misconstrues both the basic nature of their tort allegations and the dictionary definitions of those words. The foundational allegation of Plaintiffs' underlying Complaint was that smoke and/or soot from a fire allegedly *migrated* from the unit where the building manager was cooking, and *seeped* into the Plaintiffs' residential unit. (See Ex. 6 attached to Plaintiffs' 6/10/15 Answer to Application, p 1.) There is little doubt that the fire itself discharged, dispersed, and released smoke and soot – to find otherwise would mean that "hostile fire" exceptions to pollution exclusions, used throughout the insurance industry, are mere surplusage and serve no purpose. See *Firemen's Ins Co,* 474 F Supp 2d at 797. And even if the fire itself somehow did not constitute a "discharge," "dispersal," "release," or "escape" of smoke and soot, the smoke and soot's subsequent migration from the room where the fire started, and seepage into the Plaintiff's unit, independently triggered the exclusion. The Court of Appeals' effort to re-characterize the tort claim as being about the negligence of the insured's employee in starting the fire – rather than

being about the Plaintiffs' smoke inhalation injuries – does violence to the policy language[22] and runs the risk of negating pollution exclusions in general as well as a wide range of other liability exclusions.

For these reasons, XL Insurance respectfully requests that this Honorable Supreme Court enter an Order:

(A) Granting this Application for Leave to Appeal and permitting it to appeal the March 10, 2015 decision of the Court of Appeals or, in the alternative,

(B) Summarily reversing, vacating and holding for naught the March 10, 2015 decision of the Court of Appeals and June 6, 2013 Order of the Wayne County Circuit Court, and remanding the above-entitled cause of action to the Circuit Court for entry of a new Order granting XL Insurance's Motion for Summary Disposition.

SECREST WARDLE

BY: _/s/Drew W. Broaddus_____
DREW W. BROADDUS (P 64658)
Attorney for Defendant-Appellant XL Insurance
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
(616) 272-7966
dbroaddus@secrestwardle.com

Dated: January 20, 2016

[22] The plain language of the Total Pollution Exclusion Endorsement focuses on the cause of the "bodily injury," not the cause of the "pollutant." (See Ex. C.)

INDEX TO THE APPENDIX